

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAYMOND E. LOPEZ,

No. C 13-4880 TEH (PR)

Petitioner,

ORDER OF DISMISSAL WITH LEAVE
TO AMEND

v.

DAVE DAVEY, Warden,

Respondent.

Petitioner, Raymond E. Lopez, a California state prisoner, has filed a pro se Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging a judgment of conviction from the Santa Clara County Superior Court. He has been granted leave to proceed in forma pauperis.¹

I

According to the Petition, in October 2009, Petitioner was convicted of assault with force likely to cause great bodily injury and active participation in a criminal street gang. He was sentenced to two years in state prison, which was to run consecutive to his sentences in two unrelated cases – for a total indeterminate

¹ Petitioner initially named Greg Lewis, former warden of Pelican Bay State Prison, as the respondent in this action. The California Department of Corrections online inmate locator service confirms that Petitioner has been transferred to California State Prison – Corcoran (“Corcoran”). Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Dave Davey, the current warden of Corcoran, is hereby SUBSTITUTED as Respondent in place of Petitioner’s prior custodian.

1 term of thirty-nine years to life consecutive to a determinate term
2 of ten years. His conviction was affirmed by the California Court
3 of Appeal, and his petition for review was denied by the California
4 Supreme Court. The instant federal petition for a writ of habeas
5 corpus followed.

6 II

7 This Court may entertain a petition for a writ of habeas
8 corpus "in behalf of a person in custody pursuant to the judgment of
9 a State court only on the ground that he is in custody in violation
10 of the Constitution or laws or treaties of the United States." 28
11 U.S.C. § 2254(a). It shall "award the writ or issue an order
12 directing the respondent to show cause why the writ should not be
13 granted, unless it appears from the application that the applicant
14 or person detained is not entitled thereto." Id. § 2243.

15 Petitioner's sole claim for federal habeas relief states:
16 "The gang expert's testimony was error in several respects, denying
17 appellant due process of law, a fair trial, and the right to a jury
18 determination on all issues." The petition is too lacking in detail
19 to warrant a response from the respondent.

20 First, Petitioner does not adequately explain the specific
21 "errors" in the gang expert's testimony or how the "errors" impacted
22 his trial. For example, he states that "[t]he gang expert's unduly
23 specific testimony, down to the charged crimes and naming persons by
24 name as directing the very charged offenses, effectively asserted
25 the defendant's guilt." The Court does not understand this
26 argument. Indeed, the Court cannot be certain whether this is
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1 intended to be one claim or a group of claims. Petitioner does not
2 identify any specific piece of testimony given by the gang expert,
3 whether defense counsel objected, and how the trial court ruled on
4 any such objections. Petitioner must file an amended petition in
5 which he explains the factual basis for his claim.

6 Second, Petitioner has not alleged the violation of his
7 rights under the Constitution, laws or treaties of the United
8 States. “[I]t is only noncompliance with federal law that renders a
9 State’s criminal judgment susceptible to collateral attack in the
10 federal courts.” Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010)
11 (emphasis in original). Federal habeas relief is unavailable for
12 violations of state law or for alleged error in the interpretation
13 or application of state law. See id. In his amended petition,
14 Petitioner must allege the federal constitutional right (or right
15 under a treaty or federal law) that was violated by the expert’s
16 testimony. His vague reference to his rights to due process and a
17 fair trial and his right to a jury is insufficient. Conclusory
18 allegations in a habeas petition fail to state a claim and do not
19 suffice to shift the burden to the state to answer an order to show
20 cause. See Allard v. Nelson, 423 F.2d 1216, 1217 (9th Cir. 1970).

21 Finally, it is unclear whether state court remedies were
22 exhausted as to Petitioner’s claim. The exhaustion rule requires
23 that a prisoner in state custody who wishes to challenge
24 collaterally in federal habeas proceedings either the fact or length
25 of his confinement must first exhaust state judicial remedies,
26 either on direct appeal or through collateral proceedings, by
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1 presenting the highest state court available with a fair opportunity
2 to rule on the merits of each and every claim he seeks to raise in
3 federal court. See 28 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S.
4 509, 515-16 (1982); Duckworth v. Serrano, 454 U.S. 1, 3 (1981). The
5 exhaustion-of-state-remedies doctrine reflects a policy of
6 federal-state comity to give the state "an initial opportunity to
7 pass upon and correct alleged violations of its prisoners federal
8 rights." Picard v. Connor, 404 U.S. 270, 275 (1971) (internal
9 quotation marks and citations omitted). Here, a review of the
10 opinion of the California Court of Appeal shows that Petitioner's
11 contention on appeal was that "the gang expert was improperly
12 allowed to testify to the intentional commission of the charged
13 offenses by [Petitioner], and by [Petitioner] as a Norteno with the
14 understanding (i.e., intent) he was acting as a gang member
15 according to gang rules." People v. Lopez, No. H035015, 2012 WL
16 1264451, at *28 (Cal. Ct. App. Mar. 16, 2012) (internal quotation
17 marks omitted). If Petitioner has other claims relating to the
18 testimony of the gang expert that he has not exhausted, he should do
19 so promptly to avoid having his habeas petition dismissed as
20 untimely under the habeas statute of limitations. See 28 U.S.C. §
21 2244(d).

22 Sometimes it is helpful for a petitioner to attach to his
23 federal habeas petition a copy of his state court appeal brief if he
24 has asserted the claims in that brief that he wants this Court to
25 consider. If a claim has been raised in a state appellate brief
26 written by an attorney, it is usually sufficient for the petitioner
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1 to submit a copy of that state appellate brief to present his claim
2 to this Court. (This is because an appellate attorney usually will
3 have provided an adequate explanation of the facts and law, as well
4 as citations to the record so that the reviewing court may examine
5 the claim.) On the other hand, when a petitioner presents a claim
6 that has not been presented in state court by an attorney, he must
7 describe the facts that show the alleged constitutional violation,
8 must cite to the record if possible, and may cite to relevant case
9 authority in support of the claim.

10 III

11 For the foregoing reasons, the Court orders as follows:

12 1. The petition is DISMISSED with leave to amend within
13 thirty (30) days from the date this order is entered. The amendment
14 must be on the court's form for prisoner Section 2254 petitions and
15 must include the caption and civil case number used in this order (C
16 13-4880 TEH (PR)) and the words "AMENDED PETITION" on the first
17 page. The amended petition will supercede any prior filings and
18 Petitioner is reminded that the amended petition must contain all
19 claims he wishes to pursue and may not incorporate by reference any
20 parts of the original petition. See Ferdik v. Bonzelet, 963 F.2d
21 1258, 1262 (9th Cir. 1992).

22 2. Petitioner must clearly state the grounds for habeas
23 relief challenging either the underlying state court criminal
24 conviction or the legality of his confinement. In the amended
25 petition, Petitioner must demonstrate that the claims he has brought
26 are exhausted and Petitioner should include only exhausted claims.

Petitioner should include petitions to the California Supreme Court and the decision of that Court on the claims he wishes to present in federal court. If Petitioner fails to file an amended petition in conformity with this order, this action will be dismissed without prejudice.


3. It is Petitioner's responsibility to prosecute this case. Petitioner must keep the Court informed of any change of address and must comply with the Court's orders in a timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

4. The Clerk of the Court shall send Petitioner a blank habeas corpus form along with a copy of this order.

5. The Clerk is further directed to substitute Warden Dave Davey on the docket as the Respondent in this action.

IT IS SO ORDERED.

DATED 07/07/2014



THELTON E. HENDERSON
United States District Judge

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